

IN THE MATTER OF:)
)
NAINA SHAH,)
)
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Complainant,)
)
and)
)
QUEST DIAGNOSTICS LABORATORIES, INC.,)
)
)
Respondent.)

QUEST DIAGNOSTICS LABORATORIES, INC.,)
)
 Respondent.)

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

Entered this 7th day of January 2011

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

IN THE MATTER OF:

Respondent.

Judge William J. Borah

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FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Complainant began employment with Respondent on February 19, 1993, as a Histologist.
2. Complainant remained in that position until her separation from Respondent's employment on June 9, 2005.
3. Complainant's duties included the preparing of slides for microscopic evaluation by pathologists, the ensuring of the proper accessioning and labeling of all tissue samples, the ensuring of proper tissue processing, the embedding of processed tissue in paraffin and the performing of microtome of embedded tissue. Horner Aff. #5; Floutsis Aff. #3.
4. The Respondent provided clinical testing, clinical information and services to physicians, hospitals, managed care organizations, employees and government agencies. Horner Aff. #2.
5. Mr. Alexander Floutsis was Complainant's supervisor since May 13, 2002. ("Supervisor"). Floutsis Aff. #2.
6. Respondent was silent as to any disciplinary or negative evaluative information about Complainant's work performance prior to 2004; thus, it is presumed that Complainant performed her tasks in a satisfactory way up to that point in time.
7. Respondent first mentioned a corrective event that took place on May 19, 2004, where Complainant was disciplined for having food in the laboratory.
8. On October 28, 2004, Complainant received a written warning after she embedded and inadvertently cut a specimen which resulted in a "lost tissue." Complainant denied any wrongdoing.

9. In her annual performance appraisal for the year 2004, Complainant was rated as "Achieves Expectations" by her supervisor. However, it noted that she needed to improve the "quality of her slides" and "improve her interpersonal skills" with co-employees. In the space available for an employee's comment, Complainant did not claim any act of discrimination or health explanation for the declining quality of her work performance alleged by her supervisor.

10. In January 2005, Complainant's supervisor noticed an increase number of mistakes in "correctly identifying tissue types, placing specimens on incorrect slides and poorly embedding tissues." Floutsis Aff. #9.

11. In January 2005, a meeting was held between them, when Complainant informed her supervisor for the first time that she was "having difficulty seeing." Floutsis Aff #9. Complainant did not elaborate as to the reason she was "having difficulty seeing," and her supervisor did not inquire about it. Despite Complainant's employment history and her recent revelation that her vision was the cause of the increase number of errors, both parties decided to adopted a *don't ask, don't tell approach* to her health.

12. As a result of the status quo, Complainant continued to err in performing her duties during February 2005. Floutsis Aff. #11.

13. On March 2, 2005, Complainant's supervisor unilaterally and without guidance from Respondent's Human Resource Department ordered Complainant a magnifying glass and installed better lighting over her work station. Floutsis Aff. #12 & 13.

14. Complainant continued to err and kept her silence about her medical condition. Floutsis Aff. #14.

15. The supervisor also tried to assist Complainant by removing her from the task of embedding, reduced her cutting workload and, finally, he provided her with embedded tissue blocks for three months. Floutsis Aff.17. Complainant asked her supervisor not to cut her work load as it would "embarrass" her, but that request was not allowed, and her work load was cut.

16. Although the supervisor acted as if the cause of Complainant's performance errors

stemmed from her vision, he also treated Complainant's errors as a competence issue worthy of discipline. By this time, the supervisor believed her declining performance could jeopardize the "health and safety of the patients whose specimen were being analyzed." Floutsis Aff. #14. 17.

17. The supervisor failed to inquire from Complainant as to her or her doctor's thoughts on an accommodation(s) or to have the Respondent's Human Resource Department intervene.

18. Complainant further confused and complicated the perceived cause of her performance errors by declaring to her supervisor after she purchased new glasses, that she could "see just fine." Floutsis Aff. 18.

19. Following her return from vacation, Complainant's supervisor still, "identified several errors in her work performance through the first week of May 2005." It was at that point that her supervisor decided to issue a final written warning to Complainant. Floutsis Aff. #21. Complainant still had neither identified a diagnosed medical condition nor requested any specific accommodations with Respondent. (In her charge she alleged she wanted "other duties." Nothing more in way of an explanation was written.)

20. On May 17, 2005, a meeting was held between Complainant and her supervisor where a "final warning" was issued. The document memorialized her errors of work performance prior to and after her vacation. It also noted an altercation with a pathologist over an alleged error in her work performance. Complainant refused to sign the final warning letter or accept a copy of it at that time.

21. On May 24, 2005, Complainant changed her position and asked for a copy of the discussed final warning letter. Following the May 17, 2005, meeting, Complainant's performance continued to decline.

22. On May 26, 2005, the supervisor mistakenly gave to Complainant a draft of the final warning instead of a copy of the final version of the one offered to her on May 17, 2005. Floutsis Aff. #29 & #30, Horner Aff. #11. This mistake was the cause of a confrontation by Complainant with her supervisor.

23. On May 26, Complainant learned that she was terminated from her employment. Mr. Horner of the Human Resources Department assisted with the drafting of the final warning and contributed to the decision to terminate Complainant. Horner Aff. #11 & #12.

24. After Complainant learned of her employment termination, she presented a note dated May 26, 2005, from her doctor, M. Raichand, M.D., F.A.C.S., from Good Samaritan Hospital Physician Office Center. The content read that, "Ms. Shah's (Complainant) best corrected vision in each eye is about 20/40 – and she has difficulty discriminating color hues. This will prevent her from seeing the details. Additionally, because of cataract surgery she has become photophobic. This again will interfere with good vision." Comp. Exh. #3. Neither the Complainant nor her doctor mentioned glaucoma as a diagnosis or suggested any reasonable accommodations so she could continue to perform her employment duties.

25. In response to Dr. Raichand's note, the supervisor notified Complainant that, "he could not have her working with patients' specimen if she had poor eyesight, as there was no indication that any accommodation by Quest Diagnostics could rectify her sight that she could perform the essential functions of her job." Floutsis Aff. #32.

26. Later the supervisor suggested Complainant apply for disability leave, and withdrew the termination so she could comply with the internal application procedure for the benefit.

27. On May 27, 2005, Complainant confronted the supervisor about the copy of the final warning handed to her earlier as the content did not conform to what she remembered of it. After the supervisor relayed the proper copy to her, she became combative of the error to the degree that her supervisor asked her to leave his office a number of times. Her behavior ceased when her supervisor threatened to call the police. Floutsis Aff. #37 & #38.

28. On June 2, 2005, Complainant telephoned Mr. Horner, the Senior Human Resource Generalist for Respondent and represented to him that she was diagnosed with glaucoma. Horner Aff. #14.

29. Mr. Horner alleged that June 2, 2005, was the first he became "aware ...she had a

specific medical condition.” Horner Aff. #14.

30. Complainant was terminated from her employment effective June 9, 2005. Horner Aff. #15.

31. Complainant “did not take appropriate steps to initiate a disability claim” with Respondent.

32. Despite Respondent’s policies in place to address discrimination in the workplace, Complainant did not file a complaint or grievance with the Human Resource Department of Respondent or use any other internal means to seek assistance with such a claim. Horner Aff. #18.

CONCLUSIONS OF LAW

1. Complainant is an “aggrieved party” as defined by Section 1-1-3(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (“Act”).

2. Respondent is an “employer” as defined by Section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant cannot establish a prima facie case of discrimination against Respondent on the basis of her national origin, India, and/or her handicap, glaucoma.

4. Respondent can articulate a legitimate, non-discriminatory reason for its actions.

5. There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.

6. A summary decision in Respondent’s favor is appropriate in this case.

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist.1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of

law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist.1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove her case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist.1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, then a complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill.App.3d at 392, 642 N.E.2d at 490. Where the movant's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a complainant's failure to file counter-affidavits in response is frequently fatal to her case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

PRELIMINARY MATTERS

1.) Complainant as a *Pro Se* Litigant

Pro Se Complainant, Naina Shah, guided her case through the Department and the Commission, authoring pleadings and submitting written responses. There is some sympathy with the *pro se* litigant, as the practice of law requires skills that sometimes test the abilities of licensed attorneys. However, "Justice requires that the parties live with litigation decisions they have made, either through their attorney or on a *pro se* basis." Fitzgerald and Fischer Imaging Corp., IHRC, ALS No.10142, May 29,1998.

The fact that Complainant is a *pro se* litigant has no influence on this decision, as "...a *pro se* litigant is held to the standard of an attorney." Mininni and Inter-Track Partners, IHRC, ALS No.7961, December 10, 1996 quoting First Illinois Bank and Trust v. Galuska, 155 Ill.App.3d 86, 627 N.E.2d 325 (1st Dist.1993). The Illinois Appellate Court advises, "Our task is not to divine the truth from the interstices of the parties' filings or to sift through the record like a tealeaf reader conjuring up fortunes in order to gain a proper understanding of the case before us." *Id.* Complainant's written Response is held to the mandatory standards cited above.

2.) Format

Complainant responded to Respondent's motion for summary decision by filing a number of documents without any written explanation as to their relation or relevance to Respondent's motion. No counter-affidavits were submitted as part of Complainant's response. However, periodically, the discussion below quotes from an October 29, 2005, document that is neither signed nor acknowledged as authored by Complainant, but it reads as if it was her position to the Department. Complainant's name is typed on it as if it was mailed from her.

DISCUSSION

Claims of Discrimination

On June 19, 2005, Complainant, *Pro Se*, filed her Complaint with the Commission. The complaint incorporated the charge filed with the Department. Complainant's charge lists four claims of discrimination: 1) Final Written Warning – May 10, 2005, Due to my National Origin, India; 2) Final Written Warning – May 10, 2005, Due to my Physical Handicap, Glaucoma (Both Eyes); 3) Harassment – May 10, 2005, through May 27, 2005, Due to my National Origin, India; 4) Failure to Accommodate – March, 2005, through May 27, 2005, Due to my Physical Handicap, Glaucoma (Both Eyes).

Complainant had not filed a claim of discrimination which addressed her termination or separation from her employment with Respondent.

HARRASSMENT STANDARD

To establish a *prima facie* case of national origin harassment, Complainant must demonstrate: 1) she was subjected to unwelcome harassment; 2) the harassment was based on her national origin; 3) the harassment was severe and pervasive enough to alter the conditions of her employment and create a hostile and abusive working environment; and 4) there was a basis for employer liability. Beamon v. Marshall & Lisley Trust Co. 411 F.3d 854 (7th Cir. 2005); Hu and Allstate Insurance Company, ALS No. 6082, June 16, 1995, citing Crider and State of Illinois, Department of Veterans' Affairs, 25 Ill.HRC.Rep. 214 (1986).

Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission, 184 Ill.App.3d 350, 350 (1st Dist. 1989), proposed an analysis as to the quality and quantity of the alleged torment: "Harassment has been defined to include a steady barrage of opprobrious comments. More than a few isolated incidents of harassment, however, must have occurred; comments that are merely part of the casual conversation, are accidental, or are sporadic do not trigger civil rights protective measures." A decision must include a review of the "frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Id.*

Complainant claimed that a meeting with her supervisor concerning the "final written warning" was illegal harassment. (Complainant alleged in her Charge with the Department that the date of the discussion took place on May 10, 2005, and Respondent claimed it was May 17, 2005.) The substance of the meeting addressed the contents of the final warning. The document not only related to her work performance, but also to her behavior toward a co-employee, pathologist. An altercation occurred between the two, which was caused by a work related error attributed to Complainant.

Complainant failed to present any evidence to link the meeting, the substance of the meeting and the merits of the final warning with any act related to her national origin, India.

Complainant, in alleging a second act of discrimination, inaccurately described her supervisor's alleged delay in giving her a corrected copy of her final warning as an act of national origin harassment. However, it was Complainant who refused to sign and accept a copy of the warning at the designated meeting, when the issue of her poor performance and her behavior was discussed. Complainant's change of heart and to her decision to accept a copy of the final warning, days after the meeting occurred, does not obligate an immediate response from her supervisor in conformity with Complainant's unilateral time table. In any respect, Respondent gave Complainant a copy of the final warning within an estimated ten days after her request. Therefore, the error was rectified.

Complainant asserted an incident occurred when she confronted her supervisor about the mistaken copy of the final warning handed to her. He threatened to call the police. However, it was Complainant's admitted behavior and temper that escalated to the point where she was asked three times to leave her supervisor's office, before the threat to call the police occurred.

Finally, Complainant alleged that her supervisor's suggestion that she should apply for disability leave is harassment. Complainant failed to argue the basis of her conclusion and the link to national origin discrimination, India.

Complainant failed to present some factual basis that would create a triable issue on the question of whether the behavior of Respondent, separately or in totality, was related to her national origin, India, or that the behavior rose to the level of severity and pervasiveness enough to alter the conditions of her employment and create a hostile and abusive working environment. Beamon, supra.

Therefore, based upon the foregoing, there are no genuine issues of material fact that Respondent harassed Complaint based on her national origin, India, and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the

claim in this matter for harassment based on Complainant's national origin be dismissed in its entirety, with prejudice.

HANDICAP DISCRIMINATION STANDARD

To establish a *prima facie* case of handicap discrimination, Complainant would have to establish three elements. She would have to show, 1) that she is handicapped under the Act, 2) that Respondent took an adverse action against her relating to her handicap and, 3) that her handicap is unrelated to the performance of her job duties. Habinka v. Illinois Human Rights Commission, 192 Ill.App.3d 343, 548 N.E.2d 702 (1st Dist. 1989); Kenall Mfg. Co. v. Illinois Human Rights Commission, 152 Ill.App.3d 695, 504 N.E.2d 805 (1st Dist. 1987).

Where, however, a legitimate, non-discriminatory reason for the employment action has been made clear, it is no longer necessary to determine whether a *prima facie* case has been made. Since the only purpose of a *prima facie* case is to determine whether the Respondent has to articulate a legitimate reason for its action, it becomes perfunctory to analyze the matter in terms of a *prima facie* case if a legitimate, non-discriminatory reason for the action has already been articulated. Bush v. The Wackenhut Corporation, 33 Ill.HRC Rep. 161, 165, (1987), quoting, U.S. Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478 (1983). Federal cases which decide analogous questions under federal law are helpful, but not binding on the Commission in making decisions under the Illinois Human Rights Act. City of Cairo v. FEPC, 21 Ill.App.3d 358 (5th Dist.1974).

By definition, proof of a *prima facie* case raises an inference that there was discrimination. By articulating a non-discriminatory reason for the employment action in issue, the Respondent destroys the inference. At that point, the question becomes whether the reason which was articulated by the Respondent was true, or merely a pretext for discrimination. Bush, *supra*.

Respondent argued that Complainant did not have a handicap as defined by the Act, because she did not inform the Respondent of a specific named medical condition until June 2,

2005, when Complainant used the term, "Glaucoma." However, Respondent was aware of Complainant's respectable work history, until a number of errors arose in her work performance, inconsistent with that history. Then in January of 2005, Complainant declared to her supervisor that she was "having difficulty seeing."

The statement by Complainant that she had "difficulty seeing", as her explanation for her errors in work performance, should have prompted further questions, inquiries and directives by the supervisor and Human Resource Department.

"With many claims of physical handicap, it is relatively easy to identify the cause of the handicapping condition. If someone is deaf, blind, cannot walk or speak, or suffer from a well known disease such as cancer, asthma, or renal failure, it is apparent that the person so afflicted has a condition which rises to the level of a physical handicap and thus is entitled to protection under the Act." Lake Point Tower, Ltd. v. Illinois Human Rights Commission, 291 Ill.App.3d 897, 684 N.E.2d 948 (1st Dist. 1997). Lake Point Tower holds there are three ways the Commission could find that a person suffered from a handicap as defined by the Act: 1) The person is currently afflicted with a condition "which constitutes a handicap." The health condition does not have to be fully debilitating. The Act only requires that the disease not be transitory and insubstantial. 2.) The person has a "history of handicap." The Act "...protects someone with a history of handicap, even though he or she is not currently afflicted." 3.) The employer "perceives" the employee as handicapped, rightly or wrongly, and then acts against the employee based on that perception. Id.

The Respondent knew that the Complainant was suffering from "vision difficulties" that were debilitating to a point of jeopardizing her career.

ACCOMMODATION

Complainant's supervisor unilaterally decided to provide Complainant with a magnifying glass, added lighting and informed complainant that she was removed her from embedding tasks and reduced her cutting workload. He also agreed to provide Complainant with

embedded tissue blocks for three months. The supervisor knew or at least perceived Complainant's errors were health based, and attempted to facilitate her work, but Complainant's own actions and silence complicated her case.

For example, the supervisor, in mid-March, 2005, instructed Complainant to seek medical attention with her vision. Floutsis Aff. #15. However, Complainant stated in her response, "I felt no need to respond as I was already under a physician's care and have been consistently for 20 years." (Quote was from an October 29, unsigned letter of Complainant as her response.) Also, shortly thereafter, she made an announcement to her supervisor that she could "see just fine," after she purchased new glasses. The Complainant's strategy of passivity and secrecy regarding her vision difficulties had an adverse and a confusing effect as to the perceived basis of her errors in work performance. It was Complainant who decided not to respond to her supervisor's order to seek medical attention and she made misrepresentations about the quality of her vision that undermined her case.

"The employee bears the burden to assert the duty and to show that the accommodation was requested and necessary for adequate job performance." Milan v. Human Rights Commission, 169 Ill.App.3d 979, 523 N.E.2d 1155 (1st Dist.1988).

The Respondent contended Complainant never filed an internal complaint of discrimination or made a request for an accommodation. Floutsis Aff. #50; Horner Aff. #28. However, Complainant in her charge with the Department alleged that in March, 2005, she requested to be assigned to other job duties for three months. The request for temporary reassignment was allegedly denied by her supervisor. Complainant does not explain how the reassignment was a reasonable accommodation.

She failed to identified "other job duties," if they were available or to engage Respondent in a discussion about the hardship, if any, placed on Respondent. Complainant must have the ability to perform the duties of the job with a reasonable accommodation. Complainant erroneously believed that the employer was required to find her a position or create one.

Respondent was not obligated to create a position. In Harton v. City of Chicago Dept. of Public Works, 301 Ill.App.3d 378 (4th Dist. 1998), a blind applicant for a principal clerk position with the city could not perform its duties even with accommodation. In Caterpillar, Inc. v. Human Rights Commission, 154 Ill.App.3d 424, 506 N.E.2d 1029 (3rd Dist. 1987), an employee was not protected under this Act when her condition of tennis elbow related to her ability to perform her assigned work operating a radial drill. In Fitzpatrick v. Illinois Human Rights Commission, 267 Ill.App.3d 386, 642 N.E.2d 486 (4th Dist. 1994), an employer was not obligated to transfer an employee with a medical sleep problem to a different shift.

According to Complainant's supervisor, he granted one of her requested accommodations, allowing her not to embed tissue blocks for three months. Floutsis Aff. #19. However, this request for accommodation proved to be ineffective as further errors were found in Complainant's work.

Complainant's work related to the health care industry and any error on her part could have unfortunate consequences on patients. Her supervisor informed her that health and safety were being compromised, and that he had no other alternative but to terminate her employment. Floutsis Aff. #31.

After being advised of her employment termination, Complainant, submitted the May 26, 2005, note from Dr. Raichand, M.D., that, in effect, substantiated that her vision difficulty was linked to her work performance. In part, Complainant's "best corrected vision in each eye is about 20/40," she had "difficulty discriminating color hues," "which prevents her from seeing the details." and due to "cataract surgery, she has become photophobic" which "will interfere with good vision."

Where a party's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a party's failure to file counter-affidavits in response is frequently fatal to her case. Rotzoll, supra. A non-moving party must present some evidence and not just conclusions. Chevrie, supra.

"In a handicap discrimination case, the complainant fails to establish his *prima facie* case only if he cannot do the job." City of Belleville, Board of Police and Fire Commissioners v. Human Rights Commission, 167 Ill.App.3d 834, 522 N.E.2d 268 (5th Dist. 1988). Based on the affidavits submitted, Complainant could not do her job, despite the accommodations offered by the Respondent.

Complainant has failed to provide evidence of a genuine issue of material fact that either the reason for the final warning was a pretext for illegal discrimination or her handicap was unrelated to the performance of her job duties. Therefore, Complainant was not handicapped.

NATIONAL ORIGIN DISCRIMINATION STANDARD

Complainant alleged that the final warning of May 10, 2005 was motivated by her national origin, India. A Complainant can prove a *prima facie* claim of discrimination under the Act by showing: 1) that she is a member of a class protected by the Act; 2) that she was performing satisfactorily in her job; 3) that she suffered an adverse employment action; and 4) that similarly situated members of the unprotected class did not suffer the same adverse action.

Once the Respondent has articulated a legitimate, non-discriminatory reason for the employment action, it is no longer necessary to determine whether a *prima facie* case has been made. At that point, the question becomes whether the reason which was articulated by the Respondent was true, or merely a pretext for discrimination. Bush, supra.

Complainant neither denied the work performance errors Respondent cited in the final warning, nor the altercation she had with the pathologist. (The Complainant first denied the event between the two employees occurred in her charge with the Department, but in an unsigned statement, dated October 29, 2005, submitted by her as part of her response to Respondent's motion, Complainant admitted the event occurred, but described it as "questioning.") The explanation given by both parties shows that the event stemmed from an error in Complainant's work performance with the pathologist. Complainant submitted that the

motive of the pathologist was his “disrespectful” treatment of the “histology staff.” Complainant does not mention any anti-India animus.

The work performance errors were alleged to have been because of her disability, and were discussed above. However, Complainant does not mention any anti-India animus against her by her supervisor. In fact, she claims that he gave her, “positive feedback,” and that he described her as “dependable,” as well as “fun to have in the department.” Id.

The only allegation of discrimination in her charge is from a single claim that, “My (Complainant) job performance is comparable to similarly situated employee, Mary Sue (last name unknown, USA), Histology Technician I, and she was not placed on a final written warning.” However, Complainant does not link the alleged dissimilar treatment to any anti-India animus, but to handicap favoritism. “In his (Supervisor) comparison with me to a coworker that is hearing impaired, he stated that he feels sorry for her because she cannot hear. He feels she needs accommodation for her disability.” Id.

The Respondent identified Mary Sue, who was hearing impaired, as Mary Sue Bobowski. Floutsis Aff. #40. The Respondent contends that Ms. Bobowski’s work performance was “void of any corrective action.” “Moreover, unlike Complainant, Ms. Bobowski received overall performance ratings of ‘Excellent’ on her annual performance evaluation for 2003 and 2004.” Floutsis Aff. #40.

Complainant has failed to present some evidence that the final written warning was based on her national origin, India.

Therefore, Complainant has failed to provide evidence of a genuine issue of material fact on that issue of national origin discrimination, India.

RECOMMENDATION

Based upon the foregoing, Complainant has failed to present evidence of discrimination for any of her claims. As Complainant failed to file counter- affidavits, the ones filed by Respondent were taken as true. Therefore, there are no genuine issues of material fact and

Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: April 5, 2010